THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0026 OF 2016

AYIKORU GLADYS ……..…..……..…..……..……..…… PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS OF ST. MARY'S }
EDIOFE GIRLS SECONDARY SCHOOL } ……..…… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff is an eighteen year old former student of St. Mary's Ediofe Girls' Secondary School (the defendant school) which is a government aided school all girls' boarding school situated in Arua District. Her claim against the school is for general damages for general damages for violation of her right against unfair treatment and discrimination, when the defendant declined to have her registered at the school's Uganda National Examinations Board (UNEB) Center, for her Uganda Certificate of Education (UCE) 2016 examination, on grounds of poor performance at a beginning of first term examination, which the defendant unlawfully characterized as pre-registration examination. She contends that she was denied a fair hearing before that decision was taken, was psychologically tortured by the decision and inconvenienced for she had to change schools and secure registration at another centre. She seeks a declaration the defendant's decision was unlawful and unjustified, an award of damages and the costs of the suit

The uncontroverted facts are that the plaintiff was in the year 2013 admitted to the school as a senior one student. She progressed from that class, through senior two to senior three, to which she was promoted in the year 2015. At the end of the third term of that year, she was promoted from senior three to senior four. Together with other students of her class, she was on 25th November, 2015, the last day of the term, issued with a circular addressed to her parents which indicated that the first term of the following year would open on Monday 22nd February, 2016. It was further indicated in that circular that any student who did not report back on that day would

have to report back after one week because from Tuesday 23rd February, 2016 the teachers would be busy administering the beginning of term examination. The circular indicated further that "This examination must not be missed because it will be a cumulative result for the final end of year promotion and will attract some penalty. Apart from the beginning of term exams, senior fours (S.4's) and senior six (S.6's) will sit for a pre-registration examination in the first term."

The plaintiff reported back to school at the beginning of the first term in February, 2016 and together with other students that had been promoted to senior four, was subjected to a beginning of term examination. After compilation of results on 14th April, 2016 it was established that she had scored 25% in English, 15% in Mathematics, 37% in Biology, 24% in Physics, 05% in Chemistry, 07% in History, 28% in C.R.E, 43% in Geography, 38% in Commerce, and 38% in Home Management. She was graded in Division nine which meant she had failed the examination. She was not the only one who posted poor results at that examination. According to D.W.1 Mr. Alioni Luciano Cazu, the defendant's Director of Studies, there were about seven other students in her category. According to D.W.2 Sr. Grace Aciro Otto, the parents of all students who scored Division four and below were invited. The parents responded and the meeting took place on 14th April, 2016. The plaintiff and her guardian, P.W.2 Atibuni Festus, attended the meeting.

There is some controversy regarding what transpired at that meeting. According to the plaintiff the head teacher said the parents should go and register the students elsewhere. "She said she did not want shame if we did not perform well at the UCE..... that the students get demoted to senior three and if we pass we would be admitted or else we shall study from Ediofe and sit in another school of our choice. The parents tried to plead to no avail..... The school administration said I had failed the beginning of term exams and therefore our parents should register us elsewhere and not in Ediofe Girls. They also said if we wanted to continue we are allowed but will never sit for the UCE at the school. They also did not want to get ashamed of the poor results we shall get. I did not choose anything. I just went since they said I should not register. I could not stay in that environment."

On his part, P.W.2 Atibuni Festus, testified that the school administration, after a lot of pleading by the parents, set a condition that the students should be caned before they are admitted back. The rest of the seventy or so students were caned by the parents and allowed back. They said that they cannot registered her to be their UCE candidate at the school. She was among 75 others, five of whom were not excused. She was among the five that are not excused. The seventy or so others were allowed to register." I was not given options. I was told she did not meet the school standards for registration. I was advised to go with her. It meant she was not to be registered in that school. We had to find an alternative school..... The rest of the seventy or so students were caned by the parents and allowed back. The school after a lot of pleading by the parents set a condition that the students should be caned before they are admitted back."

On the other hand, D.W.1 Mr. Alioni Luciano Cazu testified that at that meeting, the school administration advised the parents and students that considering their poor performance, they were not to be registered to sit UNEB examinations "in our school and that if the parents co-operated with us we would allow them continue to be taught in Ediofe as we look somewhere else to register.....This advice was well received by all the parents. Those who did not accept the advice, took their girls to other schools of their chose. Two others remained in school but got registered elsewhere..... The options were to remain in the school but the school would register you elsewhere or they look for where to register. There was some beating by the parents at the meeting. We did not authorise the parents. It is out of their being vexed that they beat their students. On her part, D.W.2 Sr. Grace Aciro Otto testified that "After a long discussion in the meeting we agreed that those who got division 9 could not be registered with the school.....The options given to her were either to repeat or try elsewhere....."

Be that as it may, the plaintiff secured registration at Odravu Secondary School UNEB centre where she scored a third grade with 54 aggregate and decided to repeating senior four at Nyangilia Secondary school the following year. She now claims that she was psychologically tortured by the defendant's decision, she was only subjected to a beginning of term examination and was never given opportunity to sit a pre-registration examination as promised by the school in its end of year circular. In her new school, some new subjects like French were offered. Her father had to find her a special teacher to teach her French. A subject like and Home

Management was not offered and she had to drop it. She claims damages for all the inconvenience that the defendant's decision caused her.

In their written statement of defence, the defendants contend that in taking the decision they did, they followed Regulation 40 of the school Rules and Regulations providing that, "Any student who fails to perform satisfactorily in academics during the course of the year shall be asked to repeat or try elsewhere." The plaintiff was by a circular notified of the fact that she would be subjected to a pre-registration examination at the commencement of the first term of her senior four in the year 2016. Her performance at that examination was poor prompting the school administration to engage her and her parents in a meeting where it was made known to her and five or so other students in her category that because of her poor performance she would not be registered at the school's UNEB centre, but she was offered the option of being registered at another school nearby, which offer the plaintiff rejected. The students who accepted that offer remained in the school and continued to attend classes but were registered at that other school. She opted to leave the school at her own volition and hence she has no reason to complain. Therefore the suit should be dismissed with costs.

The parties were instructed to file a joint memorandum of scheduling which directive was inadvertently not complied with. Nevertheless under the provisions of Order 15 rule 5 of *The Civil Procedure Rules*, court is empowered to frame issues at trial arising from evidence on oath by either party and the court may also amend or frame additional issues on such terms as it thinks fit before judgment. According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials;- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. I therefore consider the following to be the issues for the determination of court;

1. Whether the plaintiff's right to fair treatment was violated by the defendant.
2. Whether in taking the decision not to register the plaintiff at its UNEB centre for her UCE examinations, the defendant subjected her to unlawful discrimination.
3. Whether the plaintiff is entitled to the remedies she has sought.

In her final submissions, the plaintiff argued that the defendant erroneously applied Regulation 40 of the school Rules and Regulations to her, as it was inapplicable to students in senior four. It is only on the basis of UNEB results that a candidate can repeat senior four, contrary to the provisions of that rule which can only be interpreted as empowering the school administration to advise repetition of lower classes. On the other hand, the rule does not define the expression "unsatisfactory performance." Instead of subjecting her to a both a beginning of term and pre-registration examination as stipulated in the circular, the defendant subjected her to only the beginning of term examination whose results were substituted for the pre-registration examination which was never administered as promised. In any event, performance at such an examination is not a guarantee that similar performance will be replicated at the UNEB examination at the end of the year. Being offered the option to remain in the school but register elsewhere could not remedy the unlawful decision not to register her at the school's UNEB centre. It was made clear to her at the meeting of 14th April, 2016 that she had no place in the school anymore. As result of the decision she suffered a lot of ridicule, mental anguish and inconvenience hence her claim for general damages and the costs of the suit.

In response, counsel for the defendant Mr. Jimmy Madira submitted that the plaintiff was accorded a fair hearing since she was summoned to a meeting together with her parents before the decision was taken. She was accorded fair treatment when she was issued school regulations and the rules as to how to conduct herself. Rule 40 indicated that if she did not pass she would be asked to try elsewhere. From then she attended counseling sessions for improvement. Right from senior one she was an average student and when she was promoted to senior four she was informed that there would be exams administered and those that passed would be registered to sit UNEB examinations. The exams were administered and her performance was found be below average, she did not attain the pass mark in any of the subjects. She scored a division nine. The defendant has a duty to maintain high academic standards and it is this that attracted her to join the defendant school. Joining the school is not a right but rather a privilege and once there, the student should maintain that standard. This is in line with the school policy and practice which the defendant is entitled to enforce.

As for registration, she was not denied the right to be registered. Ediofe Girls is not the only examination centre for girls. There are very many centres and she was given an option to study at that centre and be examined elsewhere. The school undertook the option to register her elsewhere. She was treated fairly because the defendant had to balance the interests that have to be balanced; the progression of the student, to maintain standards in the school. She was given a fair treatment and all her interests were upheld in all the decisions that were taken. Her interest was the school. She did not try hard enough. The decisions were always in her interest. the issue of discrimination does not arise. The examination to which she was subjected was objective because it applied across the board and it did not target an individual and the benefit would accrue to everybody. It is not discrimination because UNEB does not set standards. Being in senior four is not automatic qualification for the examination. The decision was taken in a parental way. As a parent they made the correct decision. The suit should be dismissed since the remedies sought are untenable.

First issue: Whether the plaintiff's right to fair treatment was violated by the defendant.

The right to just and fair treatment in administrative decisions is guaranteed by article 42 of *The Constitution of the Republic of Uganda, 1995*. Under that article, any person appearing before any administrative official or body has a right to be treated justly and fairly and has the right to apply to a court of law in respect of any administrative decision taken against him or her. When bodies having legal authority to decide issues affecting the rights of persons and expected to act judicially act in excess of legal authority, they will be subject to the controlling jurisdiction of the High Court. Claims an infringement of a constitutional right guaranteed by article 42 of the *Constitution* to fair treatment in administrative action, can under article 50 of the *Constitution*, be enforced by way of a suit.

Administrative action covers a particularly wide spectrum of activities. The test for determining whether an act of a particular official or body constitutes administrative action, for the purpose of deciding whether article 42 of *The Constitution* applies to it, is dependent on the nature of the power the official or body is exercising, its subject matter, and whether it involves the exercise of

a public power or performance a public function. The defendant in this suit is a grant-aided school. Under section 7 of *The Education (Pre-primary, Primary and Post-primary) Act, 2008* an education institution does not qualify for grant-aid unless it has fulfilled the requirements of the regulations for licensing and registration. Being a body registered, licensed and partly funded by government in the provision of formal secondary education, the defendant is performing a public function and article 42 of *The Constitution* applies to its administrative actions. A decision will be considered administrative if it is capable of being characterised as administrative action susceptible to judicial review under the common law, has a direct external legal effect and it adversely affects rights.

Administrative power is the authority to determine questions affecting the rights of citizens. It involves exercise of a public decision making power in relation to a set of factual circumstances applicable to the subject. The official or body after identifying which components of the available information are relevant assigns, through a process of value judgments, a degree of significance to each component of the relevant information, regard being had to the relevant statute or other empowering provision in terms of which the official or body acts. Pursuant to that evaluative process, as to how his or her statutory or public power should be exercised in the circumstances, the official or body then exercises of the statutory or public power based on the conclusion so reached. I find that in taking the decision not to permit the plaintiff registration at its UNEB accredited centre, the defendant took an administrative decision or action against the plaintiff that is subject to article 42 of *The Constitution*.

The article is designed to regulate the conduct of the public officials or bodies and private bodies when they perform acts of public administration, i.e. when they exercises a public power or function. The right to fair treatment in administrative action is a guarantee that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. It may also include the right to be given reasons for any administrative action that is taken against a person, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person. Administrative decision making must be compliant with the provisions of the Constitution because it is authorized by statutes that themselves are consistent with the Constitution. Private sector institutions that discharge

formerly governmental responsibilities are similarly bound. When powers are vested in an official or administrative body whose functions involve it in making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that the official or administrative body should act fairly towards those persons who will be affected by their decisions.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials or bodies exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment. The decisions must not be irrational. The public officials or bodies making a decision or taking action must bear in mind why the power is given, i.e. there must be a connection between the purpose and the way the power is used. The right factors must be taken into consideration, and irrelevant ones ignored. For example, there must be no discrimination on the basis of personal characteristics of the persons affected, unless in the administration of a programme that is designed to benefit people who have suffered from discrimination or other disadvantage in the past. If the decision affects people's rights, it must be proportional to the aims to be achieved, so their rights are not more affected than is necessary to achieve the objective. If lawful promises have been made, the expectations the promises give rise to must be respected. Finally, public interest does not automatically trump personal interests.

One of the key stake holders in grant-aided schools are the students. The interest of students has to be taken into account as the administrators go about their decision making. Before its repeal by *The Education (Pre-Primary, Primary and Post-Primary) Act*, of 2008, section 36 (1) of *The Education Act*, Cap 127 required every owner of a private school to manage his or her school in such a way that the interests of the pupils (students) are supreme. Schools were practically semi-autonomous being that the Ministry responsible for education could from time to time issue instructions to school owners on aspects of management of schools with a view to safeguarding the interests of the students, and every school owner was required to comply with such instructions (see section 36 (3) of *The Education Act, Cap 127*).

Upon enactment of the Act of 2008, the provision requiring owners of private schools to manage their schools in such a way that the interests of the pupils (students) are supreme, was not re-enacted. However, according to section 44 (3) of *The Education (Pre-Primary, Primary and Post-Primary) Act, 2008* the Minister or District Education Officer, may from time to time issue instructions to school owners on aspects of management of schools with a view to safeguarding the interests of the pupils and every school owner is required to comply with such instructions.

With regard to the authority to stop a student from attendance at the school, section 21 (f) of *The Education (Pre-Primary, Primary and Post-Primary) Act, 2008*, empowers a head teacher;

> when considered expedient in the interest of the school, exclude, or suspend a student from attendance at school and shall immediately report any such exclusion, suspension, to the board and the Permanent Secretary, chief administrative officer or town clerk for consideration and recommendation to the Minister or district secretary for education as the case may be, whose decision on the matter shall be final.

Therefore, a decision to exclude or suspend a student from attendance at school may be taken when considered expedient "in the interest of the school." The Act recognizes other categories of interests; the immediate closure of a school may be ordered in "the interest of health and security of the pupils" (see section 36 (4) of the Act); a school may be closed "in the national interest" (see section 42 (1) of the Act); a school may be re-opened "in the national interest" (see section 43 (2) of the Act). There are protected public values, institutional values and personal values represented by each of those interests. A question then follows as to whether in the absence of a provision as explicit as that which existed before, the subsequent Act of 2008 abandoned the normative value inherent in managing schools, in such a way that the interests of the students are no longer supreme and in its place allows for the possibility of other interests taking priority over it, i.e. whether the hierarchal argument is tenable in the case of an inter-interest conflict.

In light of those varying interests, administrative decision making within the context of schools may require the determination of a priority of those interests arising from the fact that tensions or conflicts can arise between the varying interests and their underlying values. Conflicts either cause two or more categories of interests to be set in opposition to one another (inter-interests conflict), or may reflect tensions within the same interests (intra-interests conflict). Situations

where promoting or upholding one interest causes another to partially or completely fade away. When it comes to resolving such conflict, in some scenarios the beneficiary of one interest would need to waive another interest, partially, in order to obtain a benefit. Once this interest has been partially waived with full knowledge of the facts and in return for certain safeguards, the conflict can be resolved in a relatively satisfactory manner. However, in some scenarios, the dilemma is that it is only possible to overcome the conflict by sacrificing one interest, in whole or in part, for the benefit of another interest, and by allowing the interest of one category to prevail at the expense of that of another category.

At the time the impugned decision was taken, the plaintiff was a sixteen year old student and therefore a child within the meaning of article 271 (1) (c) of *The Constitution* and section 2 (b) of *The Children Act.* Despite the absence of explicit re-enactment of the principle that "the interests of the pupils (students) are supreme" by *The Education (Pre-Primary, Primary and Post-Primary) Act, 2008* section 3 of *The Children Act* requires the "welfare principles" to be the guiding principles in making any decision based on the Act. According to Item 1 of The First Schedule of that Act, whenever any person determines any question with respect to the upbringing of a child, the child's welfare shall be of the paramount consideration. These are principles that are pervasive in all decisions taken with respect to the upbringing of a child. The provision of education is part of the process of upbringing of a child and thus decisions taken in that regard are amenable to the welfare principles, rendering such considerations to be of paramount consideration.

Item 3 of The First Schedule of *The Children Act* provides guides in the application of the "welfare principles" which include; (a) the ascertainable wishes and feelings of the child concerned, considered in the light of his or her age and understanding;(b) the child's physical, emotional and educational needs; (c) the likely effects of any changes in the child's circumstances; (d) the child's age, sex, background and any other circumstances relevant in the matter; (e) any harm that the child has suffered or is at the risk of suffering; (f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.

Ordinarily, protected public and institutional values must be harmonized with one another when they conflict. That being the case, all interests reflected in *The Education (Pre-Primary, Primary and Post-Primary) Act*, 2008 should be upheld with equal determination, since they are inter-related. Attaining practical concordance of all interests would require the avoidance of sacrificing one interest at the expense of another. Ordinarily, when conflict arises between the various interests, neither is entitled to be sacrificed *a priori* at the expense of the other. The two or more conflicting interest owe each other reciprocal concessions: their respective variance must be minimised for the purposes of overcoming, or at the very least, reducing or even deferring the conflict that exists between the interests. Conflicts between interests should be dealt with through balancing, so that a harmonization amongst them is established. This means that a fair or reasonable balance must be attained between those two or more countervailing interests.

However, concordance of interests cannot mean that all interests carry the same weight, no matter under what circumstances. When looking at the essence of these interests, some of them are bound to show a higher level of importance in the context of a specific conflict. If the interest of the student are to be paramount, the principle of proportionality, traditionally used to resolve conflicts between a fundamental right and a public interest, would apply with adaptation. Decisions that favour interests other than those of the student can only be justified in respect to reasons which are very weighty, particularly serious or constitute overriding considerations.

In that regard, any limitations on the interests of the student ought to be provided for by regulations of the school that respect the essence of those interests. On account of the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the national education policies, the ethos of the founding body of the school or the need to protect the interests of others stakeholders in that school. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of values represented in the two or more interests in conflict.

The proportionality principle or test usually contains the following three elements: (a) there must be a causal connection between the measure and the aim pursued, i.e. the measure is relevant or

pertinent; (a) there is no alternative measure available, which is less restrictive concerning the interest of the student generally; (c) there must be a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective thereby pursued and its actual attainment. This is referred to as proportionality *stricto sensu*; meaning that the measure will be disproportionate if the resulting restriction is out of proportion to the aim sought by or the result brought about by the rule.

With appropriate adaptation, the court, here, will have to examine the conflicting interests in the decisions that were taken, how severe the interests have been damaged and the circumstances under which the situation occurred, and then establish a balance in between the interests that would serves the purposes of justice, uphold the values represented in those interests, based on reason. In this regard, the court may defer to the school administration where it considers the school administration be in a better position to establish a more reasonable and justified balance, since they are more familiar with the factual background of the case and the concrete conditions in the particular school. As the guardians of law, Courts may intervene by giving some general guidelines as to the rules that should be followed but leaves it to the discretion of those in education management, including school administrators, to make the final decision on the proper balance. Courts will however intervene if the decision is shown not to be reflective of good conscience, or that it was taken for improper purposes, or that the decision-makers were misguided by extraneous or irrelevant considerations. Courts will intervene to provide a remedy where the decision arrived at is unlawful, irrational or manifestly unreasonable so as to restore the principle of proportionality.

The controversy between the plaintiff and the defendant in the instant suit fundamentally arises from the management of conflicting interests of the school administration on the one hand as opposed to those of the student, the plaintiff, on the other. The school administration undertook the implementation of a number of measures designed to uplift the grades scored by its students and the public image of the school, key among which were;- (a) career talks, counseling sessions and remedial teaching for students who do not perform to expectation, (b) cumulative termly and annual assessments of academic performance by way of beginning of term, midterm and end of year term examinations, and (c) pre-qualification for registration as a candidate at the schools'

UNEB accredited examination center by way of a pre-registration examination. It is in respect of the process and decisions made in the implementation of the latter measure that the plaintiff claims unfair treatment.

"Fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation; nothing more but nothing less" (see *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, 1978 AIR 851, 1978 SCR (3) 272*). The court elaborated further;-

> Fairness, in our opinion, is a fundamental principle of good administration. It is a rule to ensure the vast power in the modern State is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness is also a principle to ensure that statutory authority arrives at a just decision either in promoting the interest or affecting the rights of persons. To use the time-hallowed phrase that 'justice should not only be done but be seen to be done' is the essence of fairness equally applicable to administrative authorities. Fairness is thus a prime test for proper and good administration. It has no set form or procedure. It depends upon the facts of each case... Indeed, it cannot have too much elaboration of procedure since wheels of administration must move quickly.

To prove unfair treatment in the manner in which the defendant implemented its decision to pre-qualify its senior four students for registration as candidates at the school's UNEB accredited examination center by way of a pre-registration examination, the plaintiff must therefore show that the measures or decisions taken by the defendant are not reflective of good conscience, they were taken for improper purposes, were misguided by extraneous or irrelevant considerations, were not aimed at promoting her interests and that they adversely affected her or that her dignity has been significantly adversely affected or demeaned by those measures or decisions.

The controversy between the parties in the instant suit partly relates to the manner in which the assessment leading up to the decision not to permit the plaintiff to register at the school's UNEB accredited centre was done, and partly in the motives behind the decision to introduce that mode of assessment. It is trite that Courts tend to defer to academic autonomy and faculty judgments in the selection of assessment methods, particularly where learning, cognitive or psychological

disabilities are concerned. The court will nevertheless examine the manner of the impugned assessment in the determination of whether or not it is reflective of good conscience, was taken for proper purposes, and was guided by relevant considerations. Deference to academic decision-making will be dispensed with where a decision or assessment is demonstrated to have fallen short of this threshold standard in either a disciplinary or academic context.

In a secondary school setting, the most common modes of academic assessments are in three categories; formative assessment, interim assessment and summative assessments. Both “low-stakes tests” and “high-stakes tests” are used. What distinguishes a high-stakes test from a low-stakes test is not its form (how the test is designed) but its function (how the results are used). “Low-stakes tests” are usually used to measure academic achievement, identify learning problems, or inform instructional adjustments, among other purposes. On the other hand, a “high-stakes tests” is one with important consequences for the test taker. It is any test used to make important decisions about students, teachers or schools.

Formative assessment occurs in the short term, as students are in the process of making meaning of new content and of integrating it into what they already know. Feedback to the student is immediate (or nearly so), to enable the student to change his/her behavior and understandings right away. Formative Assessment also enables the teacher to rethink instructional strategies, activities, and content based on student understanding and performance. This mode of assessment can be as informal as observing the student's work or as formal as a written test. It is considered to be the most powerful type of assessment for improving student understanding and performance. It is commonly used in the course of teaching or soon thereafter before moving on to the text topic. This suit does not involve issues relating to this mode of assessment.

Interim assessment, takes place occasionally throughout a larger time period. Feedback to the student is still quick, but may not be immediate. Interim assessments tend to be more formal, using tools such as projects, written assignments, and tests. The student is usually given the opportunity to re-demonstrate his / her understanding once the feedback has been digested and acted upon. These assessments are used to evaluate student performance at periodic intervals, frequently at the end of a grading period and can be used to predict student performance on end-

of-the-year summative assessments. Assessments of this type can help teachers identify gaps in student understanding and instruction, and ideally teachers address these before moving on or by weaving remedies into upcoming instruction and activities. It was the testimony of the defendant's Director of Studies D.W.1 Alioni Luciano Cazu that they had beginning of term and midterm examinations. These are essentially designed as “low-stakes tests” interim assessments.

The beginning of term examinations perform both a diagnostic and interim assessment purpose. Diagnostic assessments are given at the start of a unit or an academic term or year. The purpose of a diagnostic assessment is to provide teachers with insights about how well the students mastered a topic or skill before it or the next one is taught. On their own, they do not have direct important consequences for the students. They only do so cumulatively, giving the students opportunity to make up for poor performance in one, by improved performance in another. It is only on basis of the average outcome that there may be important consequences for the student, by way of promotion to the next class. Since individually the beginning of term, midterm and end of term examinations could not form the basis of making important decisions about students, each of the three examinations is characterised as a “low-stakes test.”

Lastly, summative assessment takes place at the end of a large chunk of learning, with the results being primarily for the teacher's or school's use. Results may take time to be returned to the student / parent, feedback to the student is usually very limited, and the student usually has no opportunity to be reassessed. Thus, summative assessment tends to have the least impact on improving an individual student's understanding or performance. It mainly helps to ensure that students are not simply moved on from one grade level to the next without acquiring the skills they will need to succeed academically. Test results are thus used to determine whether students will be promoted in their education. This is a “high-stakes test” type of examination.

Students / parents can also use the results of summative assessments to see where the student's performance lies compared to either a standard (e.g UNEB grading criteria) or to a group of students (usually a class-level group). Teachers / schools can also use these assessments to identify strengths and weaknesses of curriculum and instruction, with improvements affecting the next year's / term's students. Summative assessments are in the form of an autopsy for the

determination of what happened, now that it is all over. For the determination of what went right and what went wrong during the teaching and learning. The defendant was administering summative assessment in a cumulative rather than a one off “high-stakes test,” until the introduction of the pre-registration examination.

Cumulative summative assessment are least likely to fall foul to challenges of unfair treatment in academic assessment. For example in *Betts v. Rector and Visitors of the Univ. of Va., No. 97-1850, 1999 U.S*, Betts joined the Medical Academic Advancement Post-Baccalaureate program (MAAP) program in the summer of 1995; however, he failed to meet the minimum requirements. After completion of the fall semester, Betts had a 2.2 GPA and a Din Physics. Nonetheless, the faculty committee decided that Betts could remain in the program on a probationary basis, on the condition that he receive tutoring and submit to testing for a learning disability. In addition, the faculty committee indicated that it would reevaluate his academic performance at the end of the spring semester and decide whether it would allow him to enter the School of Medicine with the 1996 entering class. Betts agreed to these terms, and the University Learning Needs and Evaluation Center ("LNEC") examined him. The LNEC reported that Betts lacked "adequate strategies when information exceeded the storage capacity of his short term memory," and that he "demonstrated a pattern of uneven cognitive processing skills consistent with a mild learning disability." The LNEC mistakenly concluded that Betts was actually disabled under the *Americans with Disabilities Act* (ADA) and informed Betts' professors that under the ADA, "it is the responsibility of the faculty to implement reasonable and appropriate accommodations." The LNEC recommended that Betts receive double time on all exams. Betts' professors adopted the LNEC's recommendations and allowed him double time for five of his exams in the spring semester. Betts achieved a 3.5 GPA for the five exams. However, because Betts took several of his spring semester exams prior to the double time accommodation, he only achieved a 2.84 GPA for the spring semester. His cumulative GPA for the entire year was a 2.53. The Committee nonetheless believed that Betts "needed a longer period of time to demonstrate that the accommodation would in fact allow him to do well." Rather than give him a longer period of time, the committee decided to dismiss him totally from the program because he failed to attain a 2.75 GPA. The Committee rescinded the conditional offer of acceptance to the University's School of Medicine. Betts appealed the decision to the Dean of the Medical School, Robert M.

Carey, who notified Betts that he would uphold the faculty committee's decision. Betts then filed a suit claiming that the University discriminated against him on the basis of a disability.

The court held that under *The Rehabilitation Act*, an individual must demonstrate that the defendant discriminated against him solely by reason of his disability whereas in contrast, under the ADA, an individual must demonstrate that defendant discriminated against him by reason of his disability. The ADA only required that a plaintiff demonstrate that his disability was a motivating factor in the adverse decision, even though there may have been other factors that contributed to the decision. Betts admitted that his failure to meet a GPA of 2.75 for the academic year "was the only reason" the University dismissed him from MAAP. Betts did not argue that the GPA requirement was a pretext for unlawful discrimination. At oral arguments, Betts' counsel conceded that there is no evidence that the University would have applied a different standard to anybody else in the MAAP program. It follows that the University's belief that Betts was disabled was not a motivating factor in its decision to dismiss Betts. His claim failed. Noteworthy about this case is the fact that it was only after Betts failed to achieve a GPA of 2.75 for the entire academic year that the faculty committee dismissed him from the MAAP program.

In other situations, summative assessment may be justified, for example the best qualified applicant for a university course of study is the one whose aptitude and background preparation plus the likelihood that she will work hard at it, when taken together and appropriately weighted, render her reasonably expected level of success at that course of study higher than any other applicant’s level. That may be determined at scores obtained at a one-off “high-stakes test” as opposed to a series of cumulative “low-stakes tests.”

In the instant case, the way the impugned "high-stakes" pre-registration examination is positioned takes the form of a hybrid between a diagnostic assessment and a criterion-referenced assessment. A diagnostic assessment ordinarily is an assessment of a student’s strengths, weaknesses, knowledge, and skills prior to instruction. On the other hand, a criterion-referenced assessment measures a student’s performance against a goal, specific objective, or standard, or a form of bar to measure all students against. Criterion-referenced tests have been compared to

driver’s-permit test, which require would-be drivers to achieve a minimum passing score to earn a permit. By combining aspects of a diagnostic approach with a goal specific objective, the defendant for the first time introduced a one-off "high-stakes" assessment into its system.

According to the defendant's Head Teacher, D.W.2 Sr. Grace Aciro Otto, the examination was intended to assess performance, the level of understanding of the various subjects, progress made by the students as well as determine the suitability of the students for the national examination. This was because the school administration had noted that the students had no self-drive, one had to push them. While the beginning of term exam was intended to help them revise during the holidays, by attaching consequences to tests scores in the pre-registration examination, the reasoning went, students would take the tests seriously, make personal or organizational changes, and put in the necessary effort to improve scores. It was intended to motivate students to work harder, learn more, and take the tests more seriously, which would promote higher student achievement. It would in a way establish high expectations for students, which would help reverse the cycle of low educational expectations, achievement, and attainment that historically characterized the school. She illustrated it with figures;- in 2009 the school had three first grades, in 2010 it had six; in 2014 it had 16 first grades. After the examination was introduced, in the year 2015 the school obtained 16 first grades, in 2016 they obtained 18, while in 2017 they obtained 19 first grades. The school's candidate classes have about 103 candidates per year on average

These reasons were echoed in the testimony of the defendant's Director of Studies D.W.1 Alioni Luciano Cazu who testified that the exam was for setting the school standards. The candidate must be articulate and able to prove her worth in academic performance. As a school UNEB expects them to present a well-prepared candidates. The examination is meant to benefit all stake holders including the students. It encourages them to work harder, the school benefits by good performance through reputation and increased enrolment since it serves the community. The parents benefit because more of their children get secondary school education. It improves employment opportunities when the school needs more staff with improved intake.

Some of the other reasons that justified the introduction of this pre-registration examination are to be found in the minutes of the meeting of 14th April, 2016 (D. Ex. 4). In his remarks, the Deputy Head Teacher in charge of administration commented, "...these students are lazy. They want to be driven for any activity. There must be a teacher behind them to do any academic work...sleeping in the class when the teacher is teaching. This is due to over-talking at night while they are supposed to sleep, hence less or no concentration during lesson hours and leading to poor performance in the subsequent examinations / tests." The Careers Mistress too commented as follows, "...the students are not keen in studies despite the efforts of the administration, teachers and the parents. These students are not dull or weak but lazy and careless and have a negative attitude. This is evidenced by the failure to settle down on their own for evening preps. Teachers must move throughout the prep time like prison warders or wardresses if these students are to read. Right from the beginning the students are constantly reminded of hard work but to no avail....When the results of UCE are poor, the stakeholders, parents and the whole community demand accountability from us, the school. It is a high time we improved...." The Exams Secretary too remarked, "...the students lack seriousness in academics; no serious group discussions, they don't consult the teachers regularly for what they might not have understood in class, teachers must follow them especially night preps - no teacher around no night studies, they don't share knowledge amongst themselves...."

Designed as a "high-stakes" examination that is both a diagnostic assessment and a criterion-referenced assessment, it would make sense if it were to be followed by measures meant to address the challenges the school administration had identified. The examination helped the teachers identify gaps in student understanding and instruction, and ideally the teachers needed to address these before moving on or by weaving remedies into upcoming instruction and activities. Reason would demand that the utility of the examination in addressing the challenges noted, would be found in availing the students an opportunity to re-demonstrate their understanding once the feedback has been digested and acted upon by interventions and remedies woven into upcoming instruction in the months left to the UCE exams. Instead, it was used as a summative assessment, a mode that tends to have the least impact on improving an individual student's understanding or performance. It was used to predict student performance at end-of-the-year summative UCE assessments by UNEB and decisions were taken on that basis.

This examination is an anomaly in the system. Whereas the basic rationale for the "O" Level UNEB examination is that the examination should provide sufficient proof that students are prepared to move on to the next level and that a certificate issued therefore should represent readiness for "A" Level and postsecondary learning and careers, such that students should not be allowed to earn a certificate if they haven't acquired sufficient skills and knowledge, the pre-registration examination by the school is intended to provide proof that students are prepared to take an examination due two terms away, not less than seven months ahead, based on instruction for only a couple or so months into the academic year. It was administered with a mindset not of assessment of their abilities but rather their real or perceived inadequacies.

It is a reflection of the tendency of secondary school educators to "teach to the test," i.e., to focus instruction on the topics that are most likely to be examined, or to spend valuable instructional time prepping students for tests rather than teaching them knowledge and skills that may be more important. It is symptomatic of an approach that promotes a more "narrow" academic program in secondary schools instead of an engaging, challenging, well-rounded academic program., since administrators and teachers may neglect or reduce instruction in untested, but still important formative areas such as performing arts and sports, for example. It is little wonder therefore that when asked what the plaintiff's strengths are outside academics, P.W.2 responded that she did not know of any because the plaintiff did not take initiative at anything. Such an approach may contribute to higher, or even much higher, rates of cheating among educators and students, including coordinated, large-scale cheating schemes perpetrated by school administrators and teachers who are looking to avoid the negative publicity that results from students' poor examination performance.

Moreover, the decisions were taken against the backdrop of statutes stipulating that the function of evaluating academic standards through continuous assessment and national examinations is that of Government through its relevant agencies (see section 5 (1) (e) of *The Education (Pre-Primary, Primary and Post-Primary) Act, 2008*). Consequently, according to section 4 (1) (a) and (c) of *The Uganda National Examinations Board Act*, Cap 137 it is the duty of UNEB to conduct primary, secondary, technical and such other examinations within Uganda as it may consider desirable in the public interest and to award certificates or diplomas to successful

candidates in such examinations. It is the duty of the Board's Committees to ensure the maintenance of standards appropriate to the subjects taken and to the candidates taking the examinations (see section 9 (2) (e) of the Act). Section 20 (d) of the Act empowers the Board by statutory instrument, with the prior approval of the Minister, to make byelaws regulating the qualifications of candidates.

The Board has apparently not issued such byelaws but in relation to the matter at hand, according to its letter of 14th March, 2016 ref. EA/GEN/1, addressed to all Heads of UCE and UACE Centres and UNEB Examination Centre Supervisors (a copy of which letter is available at http://uneb.ac.ug/wpcontent/uploads/2014/07/2016_GUIDELINES_ON_REGISTRATION.pdf), the "normal" registration of candidates for the year 2016 UCE and UACE examinations was set to start in April, 2016 and close on 31st May, 2016. Thereafter a late Registration surcharge of 50% would be levied for all candidates registering on 1stJune,2016 onwards and would finally close on 30th June, 2016. the last date of registration was stipulated as 15thJuly, 2016 The qualifications for "O" level candidates were stipulated as follows;

> There is no age limit for candidates taking the UCE and UACE Examinations.
>
> **UCE:** Only candidates who have **passed** PLE (Grades 1, 2, 3, and 4) or its equivalent and have attended a full lower Secondary (i.e. four years of Ordinary Level) may be registered for UCE examination. Only candidates who sat PLE in2012 or earlier shall be allowed to register. Candidates registering under USE must be those who sat PLE in 2012 only.
>
> A candidate who is **20 years old and above** and did not sit for PLE may be allowed to register for UCE examination as an ADULT PRIVATE CANDIDATE without considering his/her PLE result, with special permission from the Executive Secretary, UNEB. This condition applies to Ugandan Citizens only.

The practice and policy of UNEB as indicated in that letter was that for one to qualify for its UCE examinations, a student needs to have "attended a full lower Secondary (i.e. four years of Ordinary Level)." Within this context, since registration takes place within the first five months of the fourth year, completion of the attendance of "a full lower Secondary" would imply that the

policy targets students who have completed senior three and have been promoted by the respective UCE centers to undertake studies leading to the completion of the fourth year. At that point, a student promoted to senior four acquires a legitimate interest, subject to meeting the requirements stipulated by UNEB, to qualify for its UCE examinations.

The overall import of this legal regime is that schools have the mandate through scores obtained at either one-off “high-stakes tests” or a series of cumulative “low-stakes tests” to ensure that students are not simply moved on from one grade level to the next without acquiring the skills they will need to succeed academically at the next level, hence to determine the progression of students academically in accordance with the national curriculum. Test results are thus used to determine whether students will be promoted in their education from senior one through to senior four, by which schools evaluate academic standards guided by such criteria as may be set by Government through its agencies as mandated by section 5 (1) (e) of *The Education (Pre-Primary, Primary and Post-Primary) Act, 2008*.

Promotion to the next class is an indication that, guided by the national standards, the school administrators are satisfied that the student has acquired sufficient knowledge and skills at the current level, that he or she will need to succeed academically at the next level. This evaluation is within the mandate of the school administrators until an "O" level student is promoted to senior three. However, when a student is promoted to senior four, there are no more promotional examinations within the mandate of the school. The mandate to administer a summative promotional examination to the next class is that of UNEB, and it is statutory. The role of the school then is limited to preparing such students for their final UCE examinations to be administered by UNEB. All assessments henceforth ought to be "low-stakes" either, formative assessment, interim assessments, or diagnostic assessments designed to help teachers and students identify gaps in student understanding and instruction, and ideally fashion out remedies in preparation for the final UCE examinations by UNEB. This is where the idea of "Mock examinations" for the candidate class makes sense.

It was contended by the defendant's witnesses that the plaintiff had been promoted on probation or tentatively, but no evidence of this was produced and I find that this was not established as a

fact. The defendant further sought to rely on the provisions of Regulation 40 of the school Rules and Regulations to the effect that, "Any student who fails to perform satisfactorily in academics during the course of the year shall be asked to repeat or try elsewhere." In her submissions, the plaintiff contended that this rule does not apply to senior four candidates and I agree. Once a student is promoted to senior four, the student is deemed to have satisfied the school administration that she has acquired sufficient knowledge and skills at the senior three level, that she will need to succeed academically at the senior four level such that the option of repeating does not arise at all. Trying elsewhere is stated in that rule as an option to repeating and by implication it too does not apply to a student upon promotion to senior four. This is because such a student is only left with a duty to satisfy UNEB at the end of the year that she merits a UCE certificate and to progress to senior five. Except for indiscipline, failure to meet school dues and the UNEB examination registration fees, promotion to senior four qualifies the student to undertake activities geared at her preparation for those examinations. Demotion (repeating) or trial elsewhere for academic reasons is out of the question.

That aside, implicit in the promotion of a student from senior three to senior four, is a legitimate expectation in favour of the student. The doctrine of legitimate expectation is relatively new concept that has been fashioned by Courts for the review of administrative action. A legitimate expectation is said to arise “as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority." Therefore it extends to a benefit that an individual has received and can legitimately expect to continue or a benefit that he expects to receive. When such a legitimate expectation of an individual is defeated, it gives that person the *locus standi* to challenge the administrative decision as illegal. Thus even in the absence of a substantive right, a legitimate expectation can enable an individual to seek a judicial remedy.

Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. It may be possible though for a decision-maker to justify frustrating an established legitimate expectation where there is an overriding

public interest. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy (see *Regina v. North and East Devon Health Authority ex parte Coughlan and Secretary of State for Health Intervenor and Royal College of Nursing Intervenor, [2001] 1 QB 213, [2000] 2 WLR 622, [1999] Lloyds LR 305*). As held by Lord Denning in *Schmidt v. Secretary of State for Home Affairs, [1969] 1 All ER 904; [1969] 2 Ch 160*, even in cases, where there is no legal right, a person may still have "legitimate expectation" of receiving the benefit or privilege. In such cases, the court may protect his "expectation" by invoking principle of "fair play in action". The court may not insist that an administrative authority to act judicially, but may still insist that it too act fairly.

For example in *R (Patel) v. General Medical Council [2013] EWCA Civ 327*, the appellant, Dr Patel, wanted to qualify as a doctor. Prior to beginning a course at an overseas university, he requested confirmation from the General Medical Council ('GMC') in the UK that the course would be accepted as a primary medical qualification for the purposes of his registration as a doctor in the UK. The GMC gave this confirmation based on its policy towards acceptable overseas qualifications then in force. Subsequently, the GMC amended its policy. Based on the new criteria, the GMC told the appellant that his qualification was not acceptable. The appellant brought judicial review proceedings on grounds including that the GMC's decision to reject his qualification was unfair because of the assurance that the GMC had given initially, which he argued gave rise to a substantive legitimate expectation that had been breached. This was rejected in the High Court. Disagreeing with the High Court, the Court of Appeal found in the appellant's favour on the substantive legitimate expectation ground. The effect of the appellant's substantive legitimate expectation was that the GMC could not refuse to recognise his qualification without this being so unfair as to amount to an abuse of power.

The Court of Appeal considered that the GMC's justification for introducing a new policy with immediate effect without any consideration of transitional provisions for those who would lose eligibility under the new criteria was insufficient. There was no evidence that the GMC had considered the potential effects of the amendments. The GMC was aware that its officials had, on many occasions, given indications of the acceptability of qualifications without also stating

that the criteria were subject to change. Nevertheless, when amending the criteria, the GMC took no account of how previous representations may have become inaccurate or misleading.

In the instant case, the fact of promotion from senior three to senior four coupled with the fact that UNEB's policy in terms of minimum qualifications for registration for its UCE examination was that the plaintiff should "have passed PLE (Grades 1, 2, 3, and 4) or its equivalent and have attended a full lower Secondary (i.e. four years of Ordinary Level)" and the fact that the defendant had no legal capacity to administer any more promotional examinations for her, was enough to give rise to a substantive legitimate expectation that, barring misconduct, failure to raise the school dues for the rest of the year or the UNEB registration fees and other attendant administrative requirements, the plaintiff would be registered as a UCE candidate, at the defendant's UNEB accredited centre. The defendant has not proved that there was an overriding or countervailing public interest which justified the frustration of this legitimate expectation.

The defendant instead presented the plaintiff with an option of allowing her to continue attending classes at the school but be registered elsewhere. The implication of this offer was that she was not good enough for the defendant's UNEB accredited centre but possibly another one. Counsel for the defendant argued that this decision did not constitute a dismissal and that it is the plaintiff who on her own volition chose to leave the school instead. This is a disingenuous argument.

By way of analogy, in the law of employment when an employer’s conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and thereby regard himself as being dismissed and walk out of his employment (see *Western Excavating (ECC) Ltd v. Sharp (1978) IRLR 27*) as such conduct is deemed to be constructive dismissal, as a legal construct. In the instant case, the defendant's decision constituted a repudiation of a legitimate expectation and the plaintiff was entitled to treat it as constructive dismissal from the school.

Since there is no distinction between services offered by UNEB at the different centers, this decision was clearly driven by the school's interest not to associate itself with one of its students

they had predicted would not perform well at the forthcoming UNEB examinations and thereby tarnish the public image of the school. To avert that "danger," she had to be presented to the public as a student from another school, whereas not. Such a hypocritical decision is an abuse of power and cannot constitute a countervailing or overriding public interest.

Another perspective of legitimate expectation based on the facts of this case is the defendant's own communication at the end of the third term of the plaintiff's senior three, when she was issued with an official circular (annexure "B" to the plaint). The material aspect of the circular that was given to the plaintiff at the end of the year reads as follows;

> Apart from the beginning of term exams, senior fours (S.4's) and senior six (S.6's) will sit for a pre-registration examination in the first term.

According to the defendant's Head Teacher D.W.2 Sr. Grace Aciro Otto and the Director of studies D.W.1 Alioni Luciano Cazu, in term one the school conducts two types of examinations; beginning of term for senior two, and three. For the candidate classes they administer pre-registration examinations. In the second term for senior one, two and five it is beginning of term and end of term exams and for candidates they administer pre-mock examinations and District Mock examinations. In the final term they only run UNEB examinations for the candidate classes and the continuing students sit end of year examinations. It was contended therefore that the above statement meant that whereas other classes were to sit beginning of term examinations, the candidate classes would sit a pre-registration examination. The plaintiff disagrees and argues the communication was that the candidate classes were to sit two examinations, yet only one was given, contrary to that promise.

In situations of this nature, the question always is how on a fair reading of the promise, it would have been reasonably understood by those to whom it was made (see *Paponette and others v. Attorney General of Trinidad and Tobago [2011] 3 WLR 219*). The synonyms of "apart from" include;- "in addition," "besides," "as well," "additionally," The communication in that circular (annexure "B" to the plaint) was therefore clear, unambiguous and devoid of relevant qualification. This was an express statement made by the defendant which could only have been understood in one way. The statement was reasonably understood as requiring the plaintiff to sit both a beginning of term as well as a pre-registration examination. Given the nature of the

correspondence by which it was communicated, it was reasonable to conclude that the representation was going to be taken as unequivocal. The importance of reliance on the expectation to the plaintiff can be in no doubt.

The intended meaning is further demonstrated by the fact that the results themselves were published as "Beginning of term I exams results" (see exhibit D. Ex.3). While under cross-examination, the defendant's Head Teacher D.W.2 Sr. Grace Aciro Otto when asked why they had entitled the results that way if they had indeed been results of the pre-registration examinations, her answer was "We used this as a pre-registration examination. We did not have time to give the second examination and this was good enough." It turned out therefore that results of what was done as a beginning of term examination were out of expedience substituted for the promised pre-registration examination which the defendant was not in position to administer, as they had ran out of time if they were to beat the UNEB registration of candidates deadlines. The defendant reneged on its promise and made an outright change of policy.

"The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority (see *R (Bhatt Murphy) v. Independent Assessor [2008] EWCA Civ 755*). If the public authority has distinctly promised to implement policy in a specific manner for a specific person or group who would be substantially affected by a change, then ordinarily it must keep its promise. Acting contrary to the legitimate expectation would be to act so unfairly as to perpetrate an abuse of power. The unfair treatment implicit in this abrupt change of policy lies in the transformation of a “low-stakes test” type of examination primarily intended to measure academic achievement, identify learning problems, or inform instructional adjustments, among other purposes, into a high-stakes test for the determination of suitability to sit a summative examination at the school's UNEB centre.

According to item 11 of the UNEB letter of 14th March, 2016 addressed to all Heads of UCE and UACE Centres and UNEB Examination Centre Supervisors, a school with a UNEB center number is not allowed to register candidates from another school without a UNEB Centre

Number, except with special permission from the Executive Secretary, UNEB."None compliance has penalties attached to it which include "withdrawal of the centre number." According to item 13 of that letter, "Transfer of registered candidates from one Centre to another is discouraged by the Board, except in some very special circumstances such as illness, or the occurrence of natural disasters..... A transferred candidate shall be de-registered from the former centre, and will be required to register afresh at the new centre. Heads of Centre who accept or encourage illegal transfer of candidates will be considered for disciplinary action and such candidates will not get their results." The implication of these restrictions is that the process of registration of candidates is critical and the defendant ought to have been sensitive to the degree of disruption likely to be occasioned by such a drastic change of policy during the registration season.

In conclusion, fairness as "good conscience" (as enunciated in *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others*) demanded that in taking the decision they did, the defendants ought to have been mindful of the welfare principles as the paramount guides to their decision. It has not been demonstrated that they took into account; - the ascertainable wishes and feelings of the plaintiff, that they considered them in the light of her age and understanding, her physical, emotional and educational needs, the likely effects of any changes in her circumstances, the harm that she had suffered or was at the risk of suffering and the capacity of her parents, guardians or others involved in her care in meeting her needs, her background and any other circumstances relevant in the matter. Had they done so, they would have realised that the results of the examination they had administered indicated that she required remedies designed to help fill the gaps in her understanding of the subjects in preparation for the final UCE examinations by UNEB, rather than

I find therefore that not only is the pre-registration summative examination introduced by the defendant outside its mandate, and thereby an encroachment into the statutory mandate of the Uganda National Examinations Board, but also the decision to introduce it is not reflective of good conscience, was not taken for proper purposes and was not guided by the relevant considerations. The first issue is accordingly answered in the affirmative. The plaintiff's right to fair treatment was violated by the defendant.

Second issue: Whether in taking the decision not to register the plaintiff at its UNEB centre for her UCE examinations, the defendant subjected her to unlawful or wrongful discrimination.

The plaintiff contends that she was unlawfully discriminated against by the defendant, when she and five or so other students were singled out as not being fit to be registered at the defendant's UNEB accredited examination centre but were advised to opt to continue attending classes and studying at the school, but register elsewhere for the then forthcoming UCE examinations. According to article 21 of *The Constitution of the Republic of Uganda, 1995* to "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

However, according to article 45 thereof, the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in the Constitution are not to be regarded as excluding others not specifically mentioned. In this regard, the concept of discrimination will not be limited to the nine protected categories or groups listed in that article, but will extend to situations of discrimination occurring on the basis of unwarranted stereotypical assumptions based on group identity, of groups that are recognizably different. Group identity refers to a person's sense of belonging to a particular group. At its core, the concept describes social influence within a group. This influence may be based on some social category or on interpersonal interaction among group members.

Schools function as facilitators of teaching and learning and that necessitates multiple types of assessment to further society's interests in educating its young people. It is clearly in the school's interest to design a system that will permit excellent teaching and learning. Assessments are inherently segregative or may have a segregative impact. Therefore segregation *per se* based on academic performance is not discriminatory. Courts' defer to academic autonomy in the selection of assessment methods and promotion criteria from one level to another, for as long as they are free of discrimination and meet the intent of the law. Deference to academic decision making especially when such decisions concern issues related to educational programs is the rule but

Courts will be vigilant and intervene where such decisions smack of wrongful discrimination, where segregation is motivated by *animus*, prejudice or hostility towards specific groups of students on basis of their academic performance.

Anti-discrimination norms single out particular categories of traits and forbid discrimination among persons in certain contexts on the basis of these traits. The idea that it is wrong to discriminate on the basis of race, creed, or color commands wide assent. "The idea that it is wrong to discriminate on the basis of talent, virtue, citizenship, or friendship and family ties does not. Beyond that, the status of many classifications is uncertain, and the principle of selection looks elusive (see Richard J. Arneson, *What Is Wrongful Discrimination?*; San Diego Law Review 43 (2006): 775-808, 779. 51). Discrimination that is wrong in one context may be acceptable in another. Discrimination that is intrinsically morally wrong occurs when an agent treats a person identified as being of a certain type differently than he or she otherwise would have done because of unwarranted *animus* or prejudice against persons of that type.

Wrongful discrimination occurs where one is led to defective conduct toward another by unjustified hostile attitudes toward people perceived to be of a certain kind or faulty beliefs about the characteristics of people of that type. It involves treating a person of a given type worse, rather than merely differently, than one otherwise would have done, had one not been motivated by animus or prejudice against persons of that type. Classification of an act as discriminative though may be independent of the motivation that leads the agent to do the act. An act may be classified as discriminatory in given circumstances, in abstraction from the motive, intention, or fault that might attach to the agent’s doing of that act. Wrongful discrimination may as well arise in situations where reasonable observers of the discriminating behavior will interpret it as conveying hostile or other morally inappropriate attitudes toward the object of the discrimination.

Action or policy, otherwise justifiable, may have a disparate impact on a group of people. Its results may involve imposing a disadvantage as intended or as the unintended side effect of the pursuit of other goals, on some group. However, disparate impact *per se* is morally inconsequential. If an act or policy is otherwise morally justifiable, the fact that its consequences

favor or disfavor some group of people singled out by some morally arbitrary or neutral classification scheme is not alone a consideration that tends to render the act morally unjustifiable. On the other hand, acts that are not intrinsically morally wrong may become morally wrong for extrinsic reasons. This is so when an act takes place in circumstances where it causes bad consequences to an extent that outweighs its intrinsic innocence.

Disparate impact might offend against a substantive principle of equal opportunity. The principle of fair equality of opportunity requires that all those with the same ambition and the same native endowment of talent should have the same prospects for competitive success. If otherwise unobjectionable actions and policies bring it about that fair equality of opportunity is not satisfied, these policies will be regarded as wrong if the fair equality of opportunity principle is assigned moral priority over the principles that justify these policies.

Whichever perspective is taken, discrimination cannot be envisaged independent of group identity. It manifests in the form of responsiveness of the wrong sort to certain classifications of persons. The paradigm classification that features in wrongful discrimination is some unwarranted stereotypical assumptions based on superficial group identity. There may be situations where the operation of the exemption in the equality principle concerning the giving of a preference to certain students is justifiable. Discrimination is wrongful when it occurs on the basis of unwarranted *animus* or prejudice against persons of that type.

In a school environment, students can identify themselves with a multiplicity of formal groups such as clubs, classes, sports teams, etc. as well as informal ones such as discussion groups, peer or friendship groups, etc. Identity groups may also emerge on the basis of academic performance, hence the reference by D.W.2 to "slow learners." Although group identification is not always based on competition, identification is based on social comparison. Group identity is part of how people feel about themselves. These powerful emotional reactions and connections may produce feelings ranging from pride to prejudice. In situations involving intergroup competition, members may distance themselves from a group when it is performing less well than others. Group identity, precisely by creating an “us versus them” mentality, can produce

conflict, discrimination, and prejudice in the school environment. Social identity theory states that the in-group will discriminate against the out-group to enhance their self-image.

Segregation in a school environment is not always negative. The provision of separate educational facilities, or by other discriminatory means, separation for special treatment or observation of individuals students from a larger group for their benefit, such as segregation of gifted children into accelerated classes or remedial classes for those who are not equally gifted, is clearly responsive to their varied abilities and designed to enhance their skills optimally. However, where such disparate treatment is motivated by feelings of resentment, detestation, hostility, prejudice, spiteful or malevolent ill will, in other words *animus*, such segregation becomes repugnant to natural justice, equity and good conscience. It is offensive, heartless, selfish, and distasteful.

Discrimination may be the result of conscious, deliberate, or purposeful *animus*, as much as it may be the result of unconscious, inadvertent, or automatic forms of bias. Discrimination on the basis of an unwarranted stereotypical assumption will be found to exist where the available information does not provide direct substantiation of the conclusion reached or where such perception may have distorted the application of neutral and reasonable criteria used to evaluate the compliant belonging to a disfavored group.

Indirect discrimination occurs where a policy puts students of an identifiable group at a particular disadvantage and the provision cannot be objectively justified by a legitimate aim. Where there is a legitimate aim, the means of achieving that aim must be appropriate and necessary. Illegal discrimination includes failing to make reasonable accommodation for a student with a disability.

When an administrative decision appearing neutral on its face is challenged on the ground that its effects upon on a certain category of students is disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the classification of the decision is indeed neutral in the sense that it is not group-based. If the classification itself, covert or overt, is not group-

based, the second question is whether the adverse effect reflects invidious group-based discrimination, which is the condition that offends the Constitution.

From the testimony of the defendant's head teacher and the Director of Studies, it emerged that the decision to advise the plaintiff to seek registration elsewhere was based on her poor performance at the pre-registration examination. The two witnesses expressly stated that it was important for protection and enhancement of the school's public image as a groomer of academically successful students. In the minutes of the meeting of 14th April, 2016 (exhibit D. Ex.4) the Deputy Head Teacher - Academics remarked "By the results released by UNEB, Ediofe Girls' S. S. lies between 300 to 500 and if we continue like this, I am afraid Ediofe Girls' S. S. may lie in 1000th which we don't like." The reason behind these remarks is not hard to find.

One common feature of the high-stakes UNEB examinations is the public reporting of examination results. Individual student scores are not confidential, average or aggregate test scores for schools, districts, and states are commonly reported in public forums, and they tend to receive widespread attention from parents, the media, and the general public (See for example "*UCE star performing schools ranked*" in The New Vision of 10th February, 2013; "*New Schools Dethrone Traditional Giants in UCE*" in The Monitor Newspaper of 31stJanuary, 2016; "Best performing districts in the just released UCE exam results" on the 93.3 KFM website post of 7th February, 2018; "*Abayise ebigezo bya S4 bali mu sanyu era bacacanca*: *Ebigezo bwebikomawo abasomesa n'abayizi mu masomero agakoze obulungi bababa mu kucacanca*" on the NTV website post of February, 2018;

Comparing the hype surrounding the release of secondary school examinations results with the release of release of results for tertiary institutions, one newspaper columnist commented;

> Some weeks ago, the Uganda Business and Technical Examinations Board (UBTEB) released the results for the 2016 examinations. First lady and minister for education and sports Janet Museveni presided over the occasion in Kampala together with other officials of the board. The occasion was low-key and elicited minimal publicity, almost as if there was something embarrassing about it. The pomp and flare that accompanies the release of national examinations such as PLE, UCE and UACE was completely absent. At PLE, UCE and UACE, the public is given advance notification and the mood is electric.

> And when the results are released (by the Uganda National Examinations Board), it is all over the news – radio, TV, newspapers, social media, streets, homes and public places. The newspapers have an attention-grabbing way of allotting full coverage with no other news seeing prime space for close to a week each time.
>
> Individual performers are snapped and interviewed, rejoicing with relatives and friends. This is free, standard coverage; then there are paid-for adverts in which schools and elated parents and guardians book space to demonstrate their pride.
>
> This press interest in education is good and gives star performers the honours they deserve. It has encouraged schools to compete among themselves in a way that raises standards and performance and draws attention to the value of education, leading to greater enrollment of all age groups into the education cycle.
>
> If there is anything that showcases how much education has developed and evolved, it's how it is covered by the media and the views accompanying that coverage.
> (see Robert Atuhairwe, "*Give UBTEB exam results the deserved publicity*" in "The Observer" of 19th April, 2017).

Given that schools are public institutions, many of them supported, by public tax revenues in the form of grant-aid, the public reporting of examination results is generally motivated by the belief that school performance should be transparent and publicly known, policies and government agencies should regulate schools and ensure quality, and parents and the public have the right to know when a school is underperforming and should have the opportunity to advocate for improvements. One of the other effects of the high-stakes UNEB examination results is that scores can be used to hold schools and teachers accountable for providing a high-quality education. UNEB results may be used to trigger negative repercussions for schools, including negative public ratings, the replacement of staff members, or even closure.

However in pursuit of that noble cause, the electronic and print media has inadvertently over the years hyped the high-stakes UNEB examination results. Rather than rank performance on basis of the school's ability to provide a high-quality education to all students, including student groups that may have historically underperformed academically or considered underserved by schools, they are ranked on basis of the percentage of "star performers" the school produces. In

the resultant cut-throat competition, there is a growing intolerance in some schools of students that have historically underperformed academically or are considered underserved by schools.

The defendant responded by placing an increasingly greater burden on students to prove their academic prowess. By that pre-registration examination, the defendant replaced testing done in a manner intended to accurately reflect a student's level of achievement with one intended to predict or be reflective of their ability or disability to pass an examination that would be done at the end of the next seven or so months of preparation. The defendant effectively erected a new barrier to its students' opportunity to present themselves as candidates at the school-based UNEB centre on basis of little more than their arbitrary authority.

In doing that, the defendant failed to balance the need to protect and enhance the school's interest in its reputation against educational needs and the emotional well-being of the plaintiff as seen when resolving the first issue. The defendant completely lost sight of the need for academic accommodation. Five or so students, including the plaintiff, were prevented from sitting their UCE examinations at the defendant's UNEB accredited examinations centre where if it had been guided by the welfare principles, simple accommodations such as remedial classes in which adaptations are made to the manner in which specific subjects are taught, could have allowed them to successfully prepare for the UNEB examination. When the potential injury to the plaintiff is weighed against reasonable modifications of policies which would mitigate the risk, her exclusion from the opportunity to register at the school may not be justified.

It was argued by counsel for the defendant that the plaintiff was not a candidate at the time the decision was taken and that the decision did not prevent the plaintiff from registering at other centres, and impliedly that it did not constitute a barrier to her progress. Indeed under section 1 (a) of *The Uganda National Examinations Board Act*, Cap 137 a "candidate" is a person enrolled by the board for the purposes of sitting for any of the board's examinations. Although sitting UNEB examinations at a particular center is not a right and schools may have a wide discretion in framing candidate qualifications, any policy overtly or covertly designed to prefer the more gifted over the less gifted students in the choice of examination centre would require an exceedingly persuasive justification to withstand a challenge of unfair discrimination.

To discern the purposes underlying facially neutral policies, the court will consider the degree, inevitability, and foreseeability of any disproportionate impact, as well as the alternatives reasonably available. "Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decision-maker selected or reaffirmed a particular course of action at least in part because of, not merely "in spite of," its adverse effects upon an identifiable group (see *Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979*) Where there is proof that a discriminatory purpose has been a motivating factor in the decision,

Whereas any changes to policies in schools relating to academic performance should ideally be undertaken mindful of the fact that the school does not in that process engage in discrimination or act in a way that contributes to inequality, the defendant set out a criterion concerning qualification for enrolment at its UNEB accredited center in a way that appears to have had either the purpose or the effect of excluding or limiting the number of students likely to dent its image as a star performer, rather than geared to help them prepare better. Whereas the methods of evaluating the plaintiff's performance leading up to the candidate class were designed to measure her educational achievement, the latter one was designed to reflect her impairment.

The defendant developed a policy that on the basis of academic performance students "likely" to project the school in a more favourable light would be favored with the opportunity to undertake their examinations at the school's UNEB established centre while at the same time it harboured an unwarranted *animus* or prejudice against students considered to be of a type that was "likely to dent the image" of the school. Animus is hostility or, more broadly, a negative attitude, an aversion. To be defined as “animus,” the negative attitude must rise to a threshold of negativity. One wrongfully discriminates against a person of a certain type from prejudice when one treats the person differently than one otherwise would have done on the basis of beliefs about the person’s characteristics that are either inferred from one’s beliefs about persons of that type or directly caused by one’s reaction to the type, these beliefs being formed in some culpably defective way.

The position the school took is not dissimilar to a hypothetical situation of parents who have children in their home, some of whom are very brilliant and some of whom are not so brilliant.

Whenever there are visitors or guests around, the parents ask their not so brilliant children to go to the neighbour's home and remain there until the visitors are gone, lest their presence at home during the presence of the guests may dent their image as a "family of brilliant people." Conduct of that nature would be abhorrent as insensitive, selfish, snobbish and out rightly demeaning to the disfavored children. Under section 14 (2) (c) of *The judicature Act*, the court is to be guided by the principles of justice, equity and good conscience, where no express law or rule is applicable to any matter in issue before the Court. This practice does not meet that standard.

The decision reveals that what was relevant for the school administration as they took the decision was not the educational needs of the plaintiff but rather the school's need to project a socially engineered image, by forestalling the denting of its public image if it presented candidates who would end up performing poorly at the UNEB exams. It was a decision intended to enhance the school's sentiments of prestige considered to be threatened by the projected poor performance at the national examinations by students like the plaintiff. The plaintiff and others in her category were no longer students to be embraced, groomed and supported but instead they became detested as students to be avoided like the plague, at any cost. In resolving an apparent conflict between the individual needs of the plaintiff as a student, the school administration had little or no regard to her emotional well-being, faced with the choice of taking a decision that threatened her self-esteem.

True to social identity theory, this is a situation where the school administration, in a bid to enhance the school's self-image, sided with the "in-group" of academic achievers to discriminate against the "out-group" of students considered to be "slow learners." The school administration purposely went about the improvement of its self-image by discriminating and holding prejudiced views against the group of student's in its community it classified as "slow learners," which included the plaintiff.

There is emotional significance to a student's identification with a group, and a student's self-esteem will become bound up with group membership. If a student's self-esteem is to be maintained, her group needs have to compare favorably with other groups. A decision of this nature is apt to cause stress / mental health issues, self-identification crises, and fortification of

academic barriers and for each student in that category engender a feeling that, being a low achiever, and consider that she is somehow lesser student than her peers, and she does not, and will not, ever qualify to sit her examinations from that UNEB Centre. It a fallacy and would be disingenuous to say that such a decision was taken in the best interests of the student in light of the adverse consequences of this policy for students in that category.

It is a practice that created a stereotype threat thereby exacerbating negative stereotypes about the intelligence and academic ability of some students. "Stereotype threat" refers to the risk of confirming negative stereotypes about an individual's identity group. The term was coined by the researchers Claude Steele and Joshua Aronson (see *Stereotype Threat and the Intellectual Test Performance of African Americans*; Journal of Personality and Social Psychology Vol.69, Issue number 5 (Nov 1995), who performed experiments that showed that black college students performed worse on standardized tests than their white peers when they were reminded, before taking the tests, that their racial group tends to do poorly on such exams. When their race was not emphasized, however, black students performed similarly to their white peers.

Students subjected to stereotype threat may as a result worry so much about confirming negative intelligence stereotypes that they underperform on important exams. When such students perform so poorly that they fail a high-stakes UNEB examination, the failure will only limit their opportunities in higher education or future employment, which only perpetuates and reinforces the conditions that give rise to stereotypes.

A school culture can potentially exacerbate or mitigate the negative consequences of stereotype threat, in both subtle and blatant ways. The school has been able to carry out this patently unlawful, discriminative activity with little or no governmental intervention. Instead of shifting the responsibility on to students, the school needs to treat those it characterises as "slow learners" as members of the school community with equal opportunity in its programs and those of government and state agencies offered at the school, and include all students in its everyday activities. Rather than promote a segregated identity that engenders hostility towards low academic achievers, the school needs to instead promote an all embracing common group identity.

Communicating to students the belief that they are capable of achieving at high levels, even while giving critical feedback on their work would be a better approach. A common group identity wipes out the division between "us" and "them" and determines how likely students are to invest their own resources on integration efforts after leaving the school. Social identity is a person's sense of who they are based on their group membership(s). Schools attended are an important source of pride and self-esteem. Students should be allowed back to a world in which human compassion and moral principles trump arbitrary academic dictates.

Left unchecked, this is a vice that will lead to disproportionately targeting persistently low-performing students for expulsion from schools. The effect of the examination allows the school to make a stereotypical assumption about a student whom it regards as being ill pre-pared or incompetent to take the UNEB examination before allowing that student to demonstrate his or her competence at that examination yet the UNEB exam in intended to ensure that students are assessed on their abilities and not on the basis of their real or perceived disabilities. Implementing the exam allowed the school to keep allegedly unsavory students out of the school community. It was a decision motivated by *animus*, prejudice or hostility towards a specific group of students on basis of their academic performance, to which the plaintiff belonged and it was therefore a discriminatory decision.

Third issue: Whether the plaintiff is entitled to the remedies she has sought.

The plaintiff sought damages for the violation of her rights that caused her considerable emotional distress. General damages may be awarded where violation of another's rights occasions the victim emotional distress or mental harm (also called mental anguish) such as anguish, humiliation, torment, anxiety, insomnia, and depression. Researchers say emotional pain hurts more than physical pain and may be longer lasting. While both types of pain can hurt very much at the time they occur, social pain has the unique ability to come back over and over again, whereas physical pain lingers only as an awareness that it was indeed at one time painful. In her testimony, she stated that as a result of this treatment at the hands of the defendant, she felt psychologically tortured because the whole henceforth considered her to be a dull student, she was angered because she was not given the pre-registration examination which the school had

promised, she could not stay in that environment. She had to make stressful adjustments to her life like changing to another school, dropping one of the subjects, taking on a new one a few months to the final examinations, engaging in a crash programme of learning that new subject from scratch, and so on. She testified that she still felt the psychological torture even in the new school.

A basic method of calculating pain and suffering is to use a multiple of actual costs incurred in mitigating it. These can include medical and therapy bills, out-of-pocket expenses, lost wages, and property damage, and then multiply it by anywhere from 1 – 5 times of that, depending on the seriousness of the emotional injury.

In the instant case, the plaintiff did not adduce evidence of medication relating to psychological effects. She however testified that her father had to incur expenses of purchasing a new set of school requirements for her new school and had to engage a teacher on a special crash programme of teaching her French. I have estimated that expenditure at shs. 2,500,000 and applied to it a multiplier of four in light of the severity of the emotional impact the defendant's violations had on her at such a tender age, to arrive at an award of shs. 10,000,000/= as general damages.

In summary, judgment is entered for the plaintiff against the defendant in the following terms;-

a) shs. 10,000,000/= as general damages.
b) Interest on the award in (a) above at the rate of 8% per annum from the date of judgment until payment in full.
c) The costs of the suit.

Dated at Arua this 22th day of March, 2018 ……..

Stephen Mubiru
Judge,
22nd March, 2018.